

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

Original

77-1192

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1192, 77-1193 and 77-1219

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

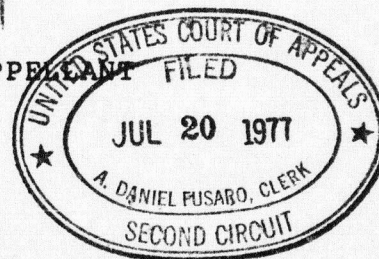
against

JOSE ROSA, JOSE VEGA and RAFAEL RODRIQUEZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT
JOSE ROSA



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Of Counsel:

Charles P. Sifton

Dated: July 20, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1192, 77-1193 and 77-1129

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
against
JOSE ROSA, JOSE VEGA and RAFAEL RODRIGUEZ,
Defendants-Appellants.

On Appeal from the United States District Court
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REPLY BRIEF OF DEFENDANT-APPELLANT JOSE ROSA

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On Appeal from the United States District Court
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REPLY BRIEF OF DEFENDANT-APPELLANT JOSE ROSA

Preliminary Statement

This reply brief is submitted in answer to the brief of the United States of America which seeks affirmance of three judgments of conviction for violation of the Federal laws relating to narcotics, 21 U.S.C. §§812, 841(a)(2) and 841(b)(2)(A), entered on March 3, 1977 and April 21, 1977 in the United States District Court for the Southern District of New York following a trial before the Honorable William C. Conner, United States District Judge, sitting without a jury.

POINT I

The entry into defendant Rosa's apartment without a warrant was unlawful.

The questions presented in this Point are:

(1) whether, having known since 8:00 A.M. on the morning of March 31, 1976, that it would be necessary to effect an arrest of the defendant in his own home, the Drug Enforcement Agency was excused from obtaining a search warrant to enter* the defendant's apartment at 12:30 P.M. the same day because of exigent circumstances said to exist at the time of the entry; and

(2) whether, in any event, the sale and commercial distribution of narcotic drugs by the defendant, which was imminent at the time of the entry into defendant's apartment, constitute exigent circumstances excusing the agents from obtaining a warrant under the applicable case law.

The Government addresses these questions by arguing that it was not until 10 or 10:30 A.M. that agents of the Drug Enforcement Agency were obliged to initiate steps to obtain a warrant and that, by that time, the same exigent circumstances

* Contrary to the Government's suggestion at p. 11 of its brief, the issue is not whether an arrest warrant should have been obtained, but rather whether a search warrant should have been secured to permit entry into the defendant's home. United States v. Santana, 427 U.S. 38 (1976); United States v. Watson, 423 U.S. 411 (1976); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

existed, namely the imminent commercial sale and distribution of the drugs, as existed at the time of entry. The Government's argument will not withstand scrutiny. Fixing 10 or 10:30 A.M. as the relevant time, presupposes that consideration of the need and initiation of steps to obtain a search warrant to enter a man's home to arrest him can be put off until the agents have dealt with every other aspect of their preparation to effect the arrest. Further, the noninstantaneous process of commercial sale and distribution of narcotic drugs does not constitute the kind of immediate and instantaneous destruction of evidence which has been recognized as involving exigencies which may excuse law enforcement officials from obtaining a warrant to enter a man's home.

The Government effectively concedes, by arguing that a warrant can be obtained in the Southern District in "approximately four hours" (Government brief at p. 11) either (1) that the warrant could have been obtained prior to the entry into the apartment if the agents had commenced procedures to obtain one at 8:00 A.M., or (2) that a greater than four hour delay in obtaining a warrant in the Southern District of New York should not be countenanced by this Court.*

* As one of the agents testified, there exists no method of obtaining warrants on an expedited basis in the Southern District of New York (Tr. 123), a situation which this Court should not countenance. Indeed, it may be argued that the prophylactic effect of the application of the exclusionary rule in correcting systemic failures of this sort, easily rectified by an institutional change, is more obvious than the effect of an exclusionary ruling in determining the conduct of the individual agents in future situations.

At 8:00 A.M. on March 31, 1976, agent Fiano, who was not called on to testify by the Government,* was given the following information by the informant (A-44):

"The SCI [Special Confidential Informant] then informed S/A Fiano that he had spent most of the early morning hours with an individual by the name of

* The Government seeks to belittle Fiano's key role in receiving the information that the arrest would have to take place in the defendant's home by referring to another agent, Garcia, as the informant's "controlling agent," an expression used but never explained by Garcia in his testimony. A-69. The expression becomes, in the Government's brief at p. 10, "the informant's handling agent." (Emphasis supplied.) As noted below, the significance of the distinction between the informant's "handling" or "controlling agent" and other DEA agents is hard to grasp except in the context of the Government's overall argument that the initiation of steps to obtain a search warrant may be postponed until all other matters relating to the arrest have been ironed out. In any event, the Government's effort ignores the fact that the informant, based no doubt on prior acquaintance, asked the DEA's communications center to contact either Fiano or Garcia for him (A-44). Fiano was then selected by the communications center as the agent to contact (A-44). Yet Fiano was not called to testify, as would be necessary if the Government wished to argue that Fiano failed to initiate steps to obtain a warrant because he thought it inappropriate to do so until the informant had talked to his "controlling" or "handling" agent. If what is at issue is whether Fiano had firsthand information concerning the informant's reliability, that fact did not require the informant to repeat his story to Garcia but only that Fiano confirm his reliability with Garcia. As noted in United States ex rel LaBelle v. LaVallee, 517 F.2d 750, 753 (2d Cir. 1975): "The assessment by the courts is to be made on the basis of the collective knowledge of the police rather than on that of the arresting officer alone." In this connection it is ironic that Garcia's affidavit supporting the defendant's arraignment recites that the information on which the complaint was based was given to Garcia by a "brother agent," presumably Fiano (A-47).

Jose ROSA and his partner Jose VEGA and that they had received approximately 1/8 kilo of heroin from a John Doe. The SCI states that ROSA told him that he would cut, pack and distribute the heroin for street sale to his runners before 11:00 A.M. in the day.[*] ROSA also stated to the SCI that he was going to keep the heroin at his place (244 East 106 Street, Apt. 9)."

This communication at 8:00 A.M. clearly advised agent Fiano that if an arrest was going to be made, it would have to take place in the defendant's home. Under the circumstances the Government was required, under the standards set forth by Justice Stevens in United States v. Roselli, 506 F.2d 627 (7th Cir. 1964), to "adequately explain why no attempt to obtain a warrant was made, or why no consideration was given to placing the defendant's apartment under surveillance while an attempt to obtain a warrant was being made." Yet, Agent Fiano, the agent in a position to get the process of obtaining a warrant started at 8:00 A.M. did not even testify. Nor did any other agent accept responsibility for the decision not to obtain a warrant.**

* The agents interpreted the "before 11:00 A.M." time for distribution, as the Government does in its brief, as meaning "at about 11:00 A.M. or at least before mid-day." Government brief at p. 4; Tr. 27 ("at 11:00"); Tr. 29 ("before mid-day"). In all events, the agents knew that it would take them, as it did, until 11:00 A.M. or later to complete their other preparations for the arrest. Simultaneously with their other preparatory steps, steps to obtain a warrant could have been undertaken as well, but were not.

** Clearly, given the variety of different estimates by the agents who did testify as to the time within which a warrant may be obtained in the Southern District, it was important for someone to accept responsibility for the decision not to seek a warrant. On its face Fiano's estimate was most relevant, since he was the one who could have initiated steps to obtain a warrant at 8:00 A.M.

According to the Government's argument, steps to obtain a warrant need not even be initiated until all information relevant to the issue of probable cause has been obtained from the informant and until all other matters of proper police preparation for the arrest have been completed. Clearly there is nothing in the case law or common sense to explain why the defendant's constitutional rights had to await the resolution of every other law enforcement problem facing the agents. The correct rule must be that in a situation such as this one, involving at the very start a significant Fourth Amendment problem, the agent must commence immediately to resolve that problem along with all of the others confronting him and not wait until every other preparatory step has been completed in the hope that by that time the warrant requirement will have disappeared.*

* Among the immediate steps which Fiano could have taken to resolve the Fourth Amendment problem were:

1. Have the informant report to the United States Courthouse rather than to DEA headquarters in order to expedite proceedings by putting the informant in immediate contact with all persons involved in obtaining a warrant including the agents, the government's attorneys and the Magistrate with the possibility of giving the Magistrate a live testimonial basis for issuance of the warrant;

2. Alternatively, dispatch an agent to the Courthouse to alert the Magistrate and the Chief of the Criminal Division of the United States Attorney's Office of the existence of an emergency situation requiring their early attention and to maintain an open line of communication by means of which the informant's story and any other relevant information could be put before the Magistrate and the issuance of the warrant relayed back to the arresting agents.

Nothing the DEA learned between 8:00 and 10:00 or 10:30 A.M. that morning increased in any significant manner the DEA's probable cause to make an arrest. Surely there was no justification for delaying initiation of procedures to obtain a search warrant simply in order to have the informant repeat in person what he had said over the 'phone,* to have the 'phone number at the apartment verified by the 'phone company as being at the defendant's address, or to obtain a layout of the apartment and determine whether the defendants were armed. Whatever incidental comfort the details supplied by this information may have given the agents in terms of establishing probable cause, this additional information gained between 8:00 and 10:00 A.M. was primarily directed not at

* The suggestion in the Government's brief that only a face-to-face report by a registered informant can be relied on to establish probable cause is not supported by the case law cited by the Government for this proposition. United States ex rel LaBelle v. LaVallee, 517 F.2d 750, 753 (2d Cir. 1975) cert. denied 423 U.S. 1062 (1976) had nothing whatsoever to do with the validity of telephoned information as opposed to information delivered face to face and, indeed, in that case the arresting officers had never talked face to face with the complaining witness. United States v. Watson, 423 U.S. 411 (1976) and Gerstein v. Pugh, 420 U.S. 103 (1975) also had nothing to do with face to face as opposed to other forms of communication. Watson involved a warrantless arrest and consent issue; there was no invasion of the defendant's home as here. In Watson, Justice White stated, "As we noted in Gerstein v. Pugh, 420 U.S. at 113 n. 13, the still unsettled question posed in...Coolidge...was 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' Watson's midday public arrest does not present that question."

determining probable cause but at finding out what the arresting agents were in for in terms of resistance or ease in making the arrests. Moreover, all of this information could have been obtained from the informant at the same time, as procedures to obtain the search warrant were underway.

However, in all events, the exigent circumstances found to exist by the Court below in this case are hardly the exigent circumstances recognized by the Supreme Court as excusing agents from obtaining a warrant. What was involved here was not, as the Government contends, the actual threat of instantaneous and irrevocable destruction of drugs, familiar from Rodriguez v. Butler, 536 F.2d 932 (2d Cir. 1976), cited by the Government, and the cases therein referred to, in which, after a prior warning to the defendants, the arresting officers are confronted with the immediate likelihood that the drugs will be flushed down the toilet, swallowed or otherwise destroyed. Instead, what the arresting agents were faced with here was simply a threatened commercial distribution of the drugs to other operatives in the distribution system -- an on-going process which the agents were fully in a position to monitor and stop in such fashion as they chose.* Of course,

* Indeed it is a perplexing question in this case why the agents did not follow the procedure familiar from other cases of waiting for the distribution to commence and thereafter arresting the distributees individually until actual exigencies required them to stop the operation by arresting all concerned. Cf. United States v. Santana, 427 U.S. 38 (1976).

if actual, as opposed to probable, exigencies arose as a result of this monitoring process, the situation would have changed entirely and permitted the agents to proceed without a warrant. However, to argue that because of a possible development of such exigencies at some time in the future, the agents could therefore dispense with the requirement of actual exigencies, would be to alter the doctrine of exigent circumstances entirely, in effect eliminating it. As pointed out in the Harvard Law Review article cited in Rosa's main brief at p. 18, agents may in almost any case "rationally perceive possibilities of destruction...a threatened-destruction exception which may well reduce in practice simply to the requirement that police officers believe they have probable cause to search." Note, Police Practices and the Threatened Destruction of Tangible Evidence, 84 Harv. Law Rev. 1465, 1473 (1971).

The cases cited by the Government in its brief on this point are singularly remote in their application to the case at hand. In United States v. Artieri, 491 F.2d 440 (2d Cir.), cert. denied, 419 U.S. 878 (1974) and United States v. Morell, 524 F.2d 550 (2d Cir. 1975), no issue concerning the officers' opportunity to obtain a search warrant was raised by the defendants, apparently because the police officers did not know until almost immediately prior to the transaction where the arrest would have to take place. Here the DEA knew from

8:00 A.M. on that the arrest would have to take place in the defendant's home at 244 East 106 Street, Apt. 9. In United States v. Santana, supra, 427 U.S. at 45, Justice Marshall, dissenting, noted the lack of application of that case to the situation at bar by stating:

"[t]he Court declines today to settle the oft reserved question of whether and under what circumstances a police officer may enter the home of a suspect in order to make a warrantless arrest."

In United States v. Brown, 540 F.2d 1048 (10th Cir. 1976) and in United States v. Price, 345 F.2d 256 (2d Cir.), cert. denied, 382 U.S. 949 (1965), the Courts found exigent circumstances to exist as a result of the discovery of the arresting agents by the suspects and the attempted flight which followed. The officers in this case did not wait until such actual exigencies arose.

POINT II

Evidence obtained pursuant to
Rosa's coerced consent should
have been suppressed.

Even if the warrantless entry into Rosa's apartment were proper -- which it was not -- the evidence* including narcotics, narcotics paraphernalia, money and statements obtained by the agents as a result of Rosa's expressed fear that the agents would search anyway and destroy the apartment in the process, should have been suppressed.**

* The papers on the bedroom dresser and on the kitchen table, Vega's gun and the narcotics in Rodriguez' possession should have been suppressed because they were obtained as a result of the unexcused warrantless entry. The fact that these items were in "plain view" either before or after the entry or were otherwise legally seized incident to the arrest which occurred after the entry, does not mean that they were properly seized since in order to effect the seizure and arrests the apartment had to be entered and that required a warrant. See Point I, supra. Contrary to the statement at p. 12 of the Government's brief, there were no narcotics on the kitchen table in plain view or otherwise.

** Rosa's expression of his belief that the agents would search the apartment in any event and "break the place up" in the process was recorded by the agents themselves in their report of April 6, 1976 as follows (A-45):

"Acting G/S Levine then asked the defendants if they [sic] were any narcotics in the house. ROSA then stated, 'there are, I'll give them to you before you search the place.' ROSA then led S/A Garcia and Acting G/S Levine to the bedroom dresser at which point ROSA withdrew a cardboard box containing (Exhibit 1-9) from one of the draws [sic] and handed it to S/A Garcia. ROSA then stated 'it's all mine.' ROSA also stated that he had some money (Exhibit #E) behind the living room sofa. S/A Garcia then asked ROSA if we could search the apartment, ROSA stated, 'you can search apartment as long as you don't break the place up, but you're wasting your time because there's no more stuff. Exhibits C and F were then seized."

The Government takes the position in its answering brief, as does Judge Conner in his opinion, that Rosa was willing to have his apartment searched, whether or not the agents had a right to do so without a warrant, and that Rosa was only concerned that his apartment not be injured in the process. His alleged consent to the search was, in the Government's and Judge Conner's analysis, a quid which Rosa knew he had the power to give or withhold and which he was witty and plucky enough to trade for the quo of preventing damage to his apartment. The argument and Judge Conner's analysis completely ignore the uncontradicted evidence, recorded in the agents' report and not denied by the agents in their testimony, that Rosa never believed that he had the power to give or withhold his consent to the search. What Rosa said was "I'll give them to you before you search the place" (A-45). All that Rosa had the wit and pluck to do was to trade his ability to point out where in the apartment the narcotics were for the agreement not to conduct a damaging and indiscriminate search. Nothing in the record contradicts the fact that Rosa believed the search would go forward whether or not he consented to it or the fact that the agents did nothing to dispel Rosa's flatly incorrect view of his rights. The bargain that Rosa struck, such as it was, was not a bargain to give up his constitutional right to insist on a search warrant as a condition for the search, but simply a bargain to facilitate the search he believed would be

conducted without his consent in exchange for protecting his property.

The cases cited by the Government on this point are far afield. In United States v. Watson, 423 U.S. 411, 424 (1976) and Schneckloth v. Bustamonte, 412 U.S. 218, 225-226 (1973), the issue was whether "the absence of proof that [the defendant] knew he could withhold his consent" required a finding that his consent was involuntary. Here the uncontradicted evidence from Rosa's own mouth was that Rosa believed he could not prevent the search by withholding his consent. So too, the "affirmative assistance" given by Rosa to the agents in this case, in an effort to limit the damaging consequences of the search he expressly indicated he believed would occur anyway, is altogether different from the "affirmative assistance" referred to in United States v. Smith, 308 F.2d 657, 664 (2d Cir. 1962), cert. denied, 372 U.S. 906 (1963) as being a factor relevant to the determination of voluntariness. The absence of any statement by the defendant affirmatively demonstrating his belief that the search would take place in all events with or without his consent likewise distinguishes this case from United States v. Candella, 469 F.2d 173 (2d Cir. 1972); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); and United States v. Rothberg, 460 F.2d 223 (2d Cir. 1972).

United States v. Weiner, 534 F.2d 15, 17 (2d Cir. 1976); United States v. Faruolo, 506 F.2d 490, 493 (2d Cir. 1974); and United States v. Sullivan, 321 F. Supp. 597 (S.D.N.Y. 1971), cited by the Government, far from supporting its position, defeat it since in each of those cases the agents did what should have been done here (even though in those cases there was no express statement by the defendant indicating that he did not understand his rights). In Weiner, supra, the arresting agent asked: "Does this mean you are giving us your consent to search the apartment?" In Faruolo, supra, "Faruolo was informed that he did not have to permit the search if he did not want to and that the house would not be searched without his consent." In Sullivan, supra, "The consent she [the defendant] signed, which she read and understood, stated that she had been advised of her right to refuse permission to search, and that the permission was freely given without threats or promises."

POINT III

The Informant should have been produced or his identity and whereabouts disclosed.

The Government misstates Rosa's argument with respect to disclosure of the informant's identity and, having substituted a strawman for the argument actually made, proceeds to knock it down. Rosa did not argue as the Government contends he did, that since he knew the informant's identity all along, the Government should have produced him. He argued instead that because the Government agents, through inadvertence or of necessity, effectively identified the informant in the course of their testimony at the hearing, it was a triumph of form over substance for the Government to continue to refuse his production. Nothing in the record indicates that the defendants were aware of the identity of the informant prior to the hearing date.

During the direct examination of Garcia, the first witness to testify for the Government, the following exchange occurred (Tr. 38-39):

"Q What happened after you entered?

A As we entered, we quietly advised the people that we were the police and we had our shields drawn. We placed everybody up against the wall. Present was a woman, two other individuals. Well, the individual that I subsequently got to know as Mr. Rodriguez.

Q Would you point him out for the record?

A The gentleman with the brown knit in the back behind Mr. Vega.

MR. SIFFERT: May the record reflect the identification of the Defendant Rodriguez.

Q Where was he when you saw him?

MR. SIFTON: Was that a complete list of the people in the apartment?

MR. SIFFERT: No.

THE COURT: He said at least those in the kitchen. There was a woman and two others, one of them was Rodriguez and I assume the other was the informant?

THE WITNESS: Yes." (Emphasis supplied)

Given this clear identification of the informant by Agent Garcia, it is difficult to comprehend either the Government's insistence that the identification of the informant by producing him would jeopardize his safety, or Judge Conner's ruling on that basis, made shortly thereafter, that the informant's production would jeopardize his life and safety (Tr. 62) even more that it had already been jeopardized by the testimony of Garcia on the record.*

* Rosa's main brief on this subject contains a typographical error in referring to Tr. 138 as the place where Judge Conner recognized that the informant's identity had already been disclosed. The correct citation is to page 38 of the transcript of the suppression hearing. Agent Garcia's clear and unequivocal testimony quoted above, at pp. 37-38 of the transcript, completely contradicts the Government's present interpretation of the testimony of agent Levine (Tr. 134) which occurred after the Court's ruling on disclosure of the informant, as saying, in effect, that the informant was one of two otherwise unidentified males present in the kitchen at the time of the arrest. Government brief at p. 15.

The decision as to whether an informant need be produced is, under the case law, to be based on a balancing of factors.

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare a defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors." Roviaro v. U.S., 353 U.S. 53, 62, (1957).

Here the fact that the informant's identity already had been disclosed during the course of the hearing, reduced decisively the weight to be accorded to the public interest in protecting the informant's anonymity.

The Government's attempt to convert Rosa's argument into an admission by the defendants that they knew who the informant was before the hearing took place, thereby placing on them the burdens of United States v. Turbide, Dkt. No. 76-1533, slip op. at 4341 (2d Cir., June 22, 1977), is thus quite misplaced and avoids responding to the defendant's argument that the Government itself compromised the informant's safety in response to questions from the Court.

In all events, the Government should have produced the informant and not objected to his identification in order

to carry its burden of establishing probable cause and to permit inquiry by the defendants on other issues.*

Leaving aside questions of the informant's reliability,** adequately discussed in Rosa's earlier brief herein at p. 9n, nothing in the Government's brief converts the informant's testimony into anything other than the "essence or core or main bulk of the evidence supporting probable cause." United States v. Commissiong, 429 F.2d 834, 838-39 (2d Cir. 1970); United States v. Tucker, 380 F.2d 206, 212 (2d Cir.

* A particularly damaging ruling prohibiting disclosure of the informant's identity prevented defendants from establishing whether the agents had evaded the statement of authority and purpose provisions of 18 U.S.C. §3109 by arranging for the informant to repair the apartment door, thus leaving it open for the agents' entry. (Tr. 106) The evidence established that at least one agent observed an individual kneeling in the open doorway with one knee inside and the other knee outside "working on the door." (Tr. 105-106) The question whether this individual was the informant was objected to and the objection was sustained with the comment "let's have no more questions designed to elicit the identity of the informant", despite counsel's question of the Court, "wouldn't it be an issue if the informant was the person who opened the door for the purpose of allowing the entry." (Tr. 106-107)

** The Government appears to concede that in only one case -- the supplying of evidence involving illegal possession of a shotgun, acted on by the City police (Tr. 78) -- had the information supplied by the informant been acted on by the time of the arrest. Neither the supplying of information on an alleged terrorist organization, the identification of dealers in a case in the Eastern District, or the identification of the informant's source of supply had been corroborated by March 31 (Tr. 21, 74, 77).

1967); United States v. Edmonds, 535 F.2d 714, 720 (2d Cir. 1976); Mapp v. Warden, 531 F.2d 1167, 1173 (2d Cir. 1976).

The principal and most recent case cited by the Government on this point in fact supplies greater support for defendant Rosa's position than it does for the Government's. Even if the glimpse by the arresting agent of tin foil and glassine on the kitchen table as they proceeded through the open door into the apartment could be regarded as independent corroboration of the informant's information obtained before the decision to arrest was reached -- which it cannot because it came too late to influence the agent's conduct one way or the other -- it fails to measure up to the requirement articulated in United States v. Gonzalez, Dkt. No. 76-1523, slip op. 3351, 3358 (2d Cir. May 6, 1977), that there be independent corroboration of all "essential elements of his information." Nor does the corroboration of such unessential details as the existence of the social club, the location of defendant's apartment, and the extent of narcotics traffic in Spanish Harlem, corroborate such clearly essential matters as whether what the informant said occurred at the social club had actually occurred there and whether a distribution of narcotics actually was to take place before midday. (There was no corroboration of this essential element of the informant's

story.) The suggestion in the Government's brief that all that need be corroborated is "aspects of the informant's present information" (Government Brief at p. 18) is hardly supported by Gonzalez, supra.

POINT IV

Rosa was improperly convicted on the basis
of out-of-date schedules of narcotic drugs.

When Congress enacted the Drug Control Act of 1970, P.L. 91-513, 84 Stat. 1247 (1970), now codified as 21 U.S.C. §§801 et seq., it passed on to the Attorney General of the United States the highly charged political issue of whether to legalize certain narcotic drugs where, given a variety of factors including "the state of current scientific knowledge regarding the subject...its history and current pattern of abuse...[and] the social significance and impact of such a decision upon those people especially the young, that would be affected by it," the Attorney General determined that legalization was warranted. House Report (Interstate and Foreign Commerce Committee) No. 91-1444, Sept. 10, 1970, 3 U.S. CODE CONG. AND AD. NEWS, 91st Cong. 2d Sess. (1970), at p. 4602-4603.

Congress accomplished this delegation of responsibility to the Attorney General by two different sections of the bill, Sections 811 and 812 of Title 21. As the House Report states (Ibid at 4589):

"Part B of the bill (sections 201 and 202 [21 USC §§811 and 812]) lists the drugs initially subject to control under the legislation, and establishes a procedure for future determination as to drugs to be subject to the controls of the bill." (Emphasis supplied.)

The procedure referred to in Section 811 of the law was a procedure whereby "on the petition of any interested

party" or on his own motion at any time, the Attorney General could (but was not obliged to) initiate proceedings to legalize a drug. The procedure set forth in Section 812 is described in the statute as follows, 21 U.S.C. §812:

"The schedules established by this section shall be updated and republished on a semi-annual basis during the two year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."
(Emphasis supplied.)

Whereas Section 811 gave the Attorney General and any interested party the power to initiate formal proceedings to legalize a particular drug at any time, Section 812 went farther, and mandated that the Attorney General give affirmative consideration to the "current" state of scientific knowledge, pattern of abuse and social significance with respect to all drugs on the schedule at least once a year (following an initial two year period when he was to consider that issue semi-annually) in order to assure that the schedules were up to date.

On the record of this case,* the Attorney General has failed entirely to exercise the weighty and highly charged

* It should be pointed out that neither the Attorney General nor any other representative of the Government offered any evidence below with respect to what actions they have taken, if any, to keep the schedules up to date. The Government filed no affidavit in opposition to the motion below despite the fact that the affidavit of defendant's counsel, on the basis of his examination of the publicly available record, affirmatively stated that, on information and belief, there had been no updating of the schedules since 1974 when the Attorney General's representative published his then updated schedules. 39 F.R. 22141 (1974) (A. 35-36). An examination of this affidavit as well as defendant Rosa's memorandum submitted below (A. 38-41) makes patently clear that defendant Rosa put in issue below the failure of the Attorney General to update as well as his failure to publish the schedules. It is, thus, incomprehensible that the Government claims, as it does in its brief, that the issue of updating was waived.

responsibilities assigned to him by Congress under the statute.

The argument of the Government and the position of the Court in United States v. Eddy, 549 F.2d 108, 111-113 (9th Cir. 1976), that the annual updating function set forth in Section 812 was simply the ministerial action, without substantive content, of codifying the results, if any, of determinations made pursuant to Section 811, appears to be, with all due respect, an effort to rationalize a sorry state of affairs in order to assure that the otherwise guilty not go free. With due respect to both the Ninth Circuit (and to Congress), it is difficult to suppose that Congress, which passed the Federal Register Act, 44 U.S.C. §1510, precisely in order to provide for the periodic codification and publication of Federal regulations (which has been regularly accomplished on an annual basis), would have thought it necessary to make special provision to the same effect as to regulations for listing or delisting narcotic drugs. The argument also makes meaningless the statement in the House Report, quoted above, referring to both Sections 811 and 812 as setting forth the "procedure for further determinations as to drugs to be subject to the controls of the bill." 3 U.S. CODE CONG. AND AD. NEWS, 91st Cong. 2d Sess. (1970), at p. 4589. Most importantly it converts a law intended by Congress to mandate annual consideration by the Attorney General of whether the schedules of

narcotic drugs are out of date into a permissive matter without time constraints, entirely discretionary on the part of the Attorney General. This Court should refuse to engage in such a major rewriting of Congress' statute simply in order to accomplish a desired result in particular cases.

The Government's further suggestion that the annual publication of the Code of Federal Regulations by the Public Printer satisfies the Attorney General's obligation* to determine annually whether specific drugs should be legalized, demonstrates how Congress' manifested intention has to be ignored in order to reach a desired result in particular cases. Clearly, Congress intended that the Attorney General and not the Public Printer should determine whether the schedules of narcotic drugs were out of date.

It may be that in future cases the Government will be able to prove that it has in fact considered annually, or on a continuous basis, whether its schedules are up to date. It has not yet done so on the record in this case. Moreover, its position on this record and on this appeal makes clear that it

* As noted in Rosa's initial brief herein at p. 28, responsibility for the administration of Section 812, including the requirement of updating and republication, is placed on the Attorney General of the United States or his delegate by Section 811 of Title 21:

"The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by Section 812 of this title and to any other drug or any substance added to such schedules under this subchapter."

does not regard itself as under any legal mandate to do so.
That misunderstanding of its obligations should be clarified by
this Court via the dismissal of the indictment in this case.

CONCLUSION

For the reasons set forth herein it is respectfully
requested that defendant's conviction be reversed.

Dated: New York, New York
July 20, 1977

Respectfully submitted,

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